CREDIT CORPORATION (M) BERHAD

v.

CHOI SANG & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. C2-24-5650-86]
14 DECEMBER 1988

CIVIL PROCEDURE: *Appeal from Senior Assistant Registrar's decision dismissing application for summary judgment - Whether there was delay in filing application.*

CONTRACT: *Claim on hire purchase agreement and guarantee - Whether Hire Purchase Act 1967 applicable and complied with - Whether notice of intention to repossess ineffective - Whether plaintiff had failed to mitigate defendant's loss - Whether there was a proper demand made on the guarantor.*

The plaintiff was the hirer of an excavator and the claim was for sums due on a hire purchase agreement. The 2nd defendant was sued as a guarantor pursuant to a letter of guarantee wherein he undertook to make payment upon written demand of all sums due to the plaintiff under the hire purchase agreement and to indemnify the plaintiff against all loss, damage or expense which the plaintiff may sustain by reason of the 1st defendant's breach of the hire purchase agreement.

The plaintiff's application for summary judgment under O. 14 was dismissed by the Senior Assistant Registrar and this was an appeal against that order.

Held:

[1] As the equipment hired in this case is not one of those listed in the First Schedule to the Hire Purchase Act 1967, the Act is therefore not applicable to the facts of this case.

[2] There was no affidavit in reply relating the plaintiff's explanation and as such the 1st defendant's objection to the legality and effect of the notice of intention to repossess must fail.

[3] The plaintiff had taken all reasonable steps to obtain the best reasonable price and to that end, the defendant's objection that the plaintiff had failed to mitigate their loss must also fail.

[4] The explanation of the plaintiff as to the delay in filing the O. 14 application is as good an explanation as any, particularly when the defendants have not been in any way prejudiced by the delay. Moreover, averments in the statement of defence have all been rebutted by the plaintiff in their affidavit in support of the O. 14 application and no purpose would be served if this matter is allowed to proceed to trial, when it can be dealt with summarily.

[5] The law on the effect of the presence of a principal debtor clause in a guarantee is clear in that it obviates the necessity of a creditor to make a demand. The guarantee is no longer a collateral agreement and as such there is no need for a demand as the issuance of the writ is a demand in itself. Where a guarantee contains both a written demand clause and a principal debtor clause, the latter overrides the condition precedent of a written demand.

[Appeal allowed with costs.]

Cases referred to:
Krishnamurthy & Anor. v. Malayan Finance Corporation Bhd. [1986] CLJ (Rep) 170
Mok Hin Wah & Ors. v. United Malayan Banking Corp. Bhd. [1987] CLJ (Rep) 219

Legislation referred to:
Hire Purchase Act 1967, ss. 16(1), (3), (4), (5)
Rules of the High Court 1980, O. 14

For the plaintiff/appellant - Chuah Mei Lin; M/s. Weng Kwai & Co.
For the defendants/respondents - Rajkumari; M/s. Lewis & Co.

JUDGMENT

Siti Norma Yaakob J:

The plaintiff in this suit is the hirer of an excavator, bearing registration number WAE 6983 and the instant claim is for sums due on a hire purchase agreement dated 5 March 1984, particulars of which appear in para. 3 of the amended statement of claim. The 2nd defendant is sued as a guarantor pursuant to the letter of guarantee executed the same day as the hire purchase agreement wherein he undertook to make payment upon written demand of all sums due to the plaintiff under the hire purchase agreement and to indemnify the plaintiff against all loss, damage or expense which the plaintiff may sustain by reason of the 1st defendant's breach of the hire purchase agreement.

Before the Senior Assistant Registrar, the plaintiff's application for summary judgment under O. 14 was dismissed with costs and the proceedings before me was therefore an appeal against that order.

From the defendants' statement of defence and the 2nd defendant's affidavit in reply, the following issues were canvassed by them.

1. The plaintiff had failed to comply with ss. 16(1), (4) and (5) of the Hire Purchase Act 1967 (the Act).
2. The notice of intention to repossess under s. 16(3) of the Act was only issued after the excavator had been repossessed and as such the notice is ineffective.
3. The proceeds of sale was very much below the hire purchase price as well as the residual value of the excavator and as such the plaintiff had failed to mitigate their loss.
4. There was delay in filing the O. 14 application.
5. There was no proper demand made to the 2nd defendant.

As the equipment hired in this case is not one of those listed in the First Schedule to the Act, the Act is therefore not applicable to the facts of this case.

The plaintiff have also explained that they had issued notice of intention to repossess on the 1st defendant on 11 May 1984, informing the 1st defendant that they intend to retake possession of the excavator after the expiry of 7 days from service of the notice, unless the arrears of instalments are paid to them. However the excavator was only repossessed almost 2 years later, on 26 April 1986 and during that period it was stored at a repairer's shop called Tat Seng Excavator Repairer, where it remained until it was sold.

Following the repossession, the plaintiff sent a notice after repossession to the 1st defendant with a copy to the 2nd defendant, giving the 1st defendant 14 days after service, to either reinstate the agreement by paying all arrears of rental due and remedy the breaches for which

the plaintiff would redeliver the excavator or finalise the agreement by paying the balance due under the agreement and costs of repossession.

There was no affidavit in reply refuting the plaintiff's explanation and as such the 1st defendant's objection to the legality and effect of the notice of intention to repossess must fail.

The excavator was sold on 29 May 1986, a month after it was repossessed on 26 April 1986, to the highest tendered at RM7,000 a price well below the hire purchase price and below the residual value of the excavator.

The affidavit evidence on this shows that the plaintiff had arranged for tenders to be made to sell the equipment but only 3 tenderers responded for which offers for RM5,400, RM5,900 RM7,000 were received. The plaintiff accepted the highest tender and under the circumstances of this case, I do not think the plaintiff can do any better bearing in mind that

(1) the equipment was only repossessed on 26 April 1986, 2 years after the notice of intention to repossess had been sent. The affidavit evidence shows that it had been discarded by the 1st defendant since July 1984.

(2) photographs exhibited by the plaintiff show the condition of the excavator as being badly damaged and according to the plaintiff, non-operational.

(3) the 1st defendant did not surrender the registration card and the plaintiff had also failed to trace it.

As these facts are not disputed by the defendants and based on the affidavit evidence, I consider that the plaintiff had taken all reasonable steps to obtain the best reasonable price and to that end, the defendants' objection that the plaintiff had failed to mitigate their loss must also fail.

The law as to the time when an O. 14 application must be made has been decided by the Supreme Court in the case of *Krishnamurthy & Anor. v. Malayan Finance Corporation Bhd.* [1986] CLJ (Rep) 170 as follows:

> The application must be made after appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the Court, no O. 14 judgment would be signed.

In this case the O. 14 application was only made on 19 June 1987, almost 6 months after the defendants had filed their statement of defence on 15 December 1986. The explanation given by the plaintiff for this delay is that a creditor's petition had already been presented against the 2nd defendant which was fixed for hearing on 4 May 1987. The creditor in the petition is MBF Finance Berhad who had also retained the same solicitors as the plaintiff. Whilst waiting for the Court's decision on the creditor's petition, the plaintiff had refrained from filing the O. 14 application.

The defendants' objection to this explanation is that the plaintiff may well not proceed against the 2nd defendant in view of the pending creditor's petition but this should not prevent them from proceeding against the 1st defendant. To this, the plaintiff further explained that should receiving and adjudicating orders be made against the 2nd defendant on 4 May 1987, the plaintiff had no intention of entering judgment against the 1st defendant. However, on 4 May 1987, the 2nd defendant applied to have the creditor's petition adjourned to enable

him to apply to set aside the 2 judgments which formed the basis of the petition. The petition was accordingly adjourned and it was then that the plaintiff decided to proceed with the filing of the O. 14 application which they did a month later on 10 June 1987.

To me this is as good an explanation as any, particularly when the defendants have not been in any way prejudiced by the delay. Moreover, averments in the statement of defence have all been rebutted by the plaintiff in their affidavit in support of the O. 14 application and no purpose would be served if this matter is allowed to proceed to trial, when it can be dealt with summarily.

Lastly, I come to the 2nd defendant's objection that he had not been properly served with a notice of demand and for this relies on the decision of 2 cases, *Mok Hin Wah & Ors. v. United Malayan Banking Corp. Bhd.* [1987] CLJ (Rep) 219 and *Public Bank Berhad v. Chan Giok Lie @ Chung Kim Chuan & Ors. (unreported)*. I need to stress here that objection to the notice of demand was never pleaded by the 2nd defendant in his statement of defence but he now seeks to improve on his defence by averring so.

The liability of a guarantor depends greatly on the words and expressions used in the guarantee and the interpretation to be given to such words and expressions. Clause 1 of the guarantee specifies that the liability to pay only arises under the guarantee upon a written demand being made by the plaintiff and received by the 2nd defendant. In this case a written demand was made but there is no proof of receipt as the AR Card was never returned. Clause 3 of the guarantee goes further to declare that the 2nd defendant is deemed to be a principal debtor and he waives all suretyship and other rights inconsistent with this clause.

The law on the effect of the presence of a principal debtor clause in a guarantee is clear in that it obviates the necessity of a creditor to make a demand. This is so as a guarantee is a collateral agreement and before being sued, it is only right and just that a demand be made on the guarantor. However, the character of the guarantee changes where there is also included a principal debtor clause in the body of the guarantee. The guarantee is no longer a collateral agreement and as such there is no need for a demand as the issuance of the writ is a demand in itself. *Mok Hin Wali's* case is distinguishable in that the guarantee sought to be enforced did not contain principal debtor clause and as such the case is not applicable to the facts of the case before me. On the other hand, *Public Bank's* case is supportive of the plaintiff's case as in that case, Dato' Shankar J was also of the view that no demand is necessary where there is a principal debtor clause. However where a guarantee contains both a written demand clause and a principal debtor clause, it is my considered opinion that the latter overrides the condition precedent of a written demand. In the *Public Bank's* case, the dispute was more on whether the written demand sent was inoperative as it did not precisely state the actual amount due and owing by the principal debtor.

As all the issues raised by the defendants have been determined by the affidavit evidence, I had accordingly allowed the plaintiff's appeal with costs and that judgment for all the sums claimed be entered for the plaintiff against the defendants with costs.

Also found at [1989] 1 CLJ 1070